

**Department of
Conservation &
Development**

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**Contra
Costa
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Catherine Kutsuris
Director

September 10, 2010

Delta Stewardship Council
650 Capitol Mall, Fifth Floor
Sacramento, CA 95814

Re: Comments on the Delta Stewardship Council Administrative Procedures for Appeals and Reviews

Dear Chair Isenberg and Councilmembers

This letter offers comments on the Delta Stewardship Council's decision to defer action on Administrative Procedures for Appeals and Reviews to your September meeting. Contra Costa County supports the Council's de novo review of BDCP appeals and encourages the Council to maintain that provision in the Administrative Procedures. This independent review by the Council is appropriate, especially since the Council is responsible for preparation of the Delta Plan and for incorporating the BDCP in the Delta Plan.

The process described in the Delta Reform Act calls on the Department of Fish and Game to initially determine whether the BDCP complies with Section 85320 of the Water Code. The process also allows for this initial determination to be appealed to the Council, which is the only body responsible for deciding if such an appeal has merit. The statutory criteria for BDCP compliance go beyond the Natural Communities Conservation Planning Act (NCCP Act) and the California Environmental Quality Act (CEQA). In addition, the Delta Reform Act mandates a "comprehensive review and analysis" of:

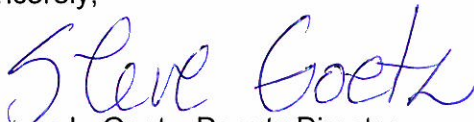
- Other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.
- A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, and unlined canal, and pipelines.
- The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.
- The potential effects on Sacramento River and San Joaquin River flood management.
- The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.
- The potential effects of each Delta conveyance alternative on Delta water quality.

The plain meaning of the statute is that, if the Department of Fish and Game approves the BDCP as a Natural Communities Conservation Plan and determines the BDCP meets the requirements of Section 85320, and if the BDCP has been approved as a Habitat Conservation Plan, the Council should incorporate the BDCP into the Delta Plan, unless Fish & Game's determination that the BDCP meets the requirements of Section 85320 is appealed to the Council. In that case, if the Council upholds the appeal, the BDCP would not be included in the Delta Plan. Such a decision by the Council would not affect the permits granted by state or federal regulatory agencies or affect the legal adequacy of the BDCP's Environmental Impact Report.

While Fish & Game may make an initial determination that the BDCP meets the requirements of Section 85320, the Delta Reform Act designates the Council as the ultimate arbiter of that determination. Any appellant should be able to rely on the Council to fulfill this supervisory role in an objective, independent manner, which can only be accomplished through de novo review. The plain meaning of the Delta Reform Act grants the Council broad discretion in deciding on BDCP appeals and necessarily so. If the BDCP is to be included in the Delta Plan, there must be some provision to ensure the BDCP is compatible with the Delta Plan. The criteria set forth in Section 85320 are entirely consistent with the co-equal goals that the Delta Plan is meant to further.

The potential exists for the BDCP to be developed in a manner that complies with CEQA and the NCCP Act, but creates a fundamental conflict with the Delta Plan. This conflict can result from failing to provide a sufficiently comprehensive review and analysis of the criteria in Section 85320. Such facts can be brought to the Council through an appeal, in which case it is entirely appropriate for the Council to go beyond the administrative record used by the Department of Fish and Game to determine the BDCP compliance with Section 85320. The compliance decision is not a legal decision or a regulatory decision; it is a policy decision. The Delta Reform Act does not require the Council to defer to a regulatory agency (Fish & Game) for this policy decision. The Council should adopt the de novo review standard to ensure its independent judgment and discretion for this policy decision as envisioned by the statute.

Sincerely,



Steven L. Goetz, Deputy Director
Conservation and Transportation Planning Programs

cc: Contra Costa County Legislative Delegation
Contra Costa County Board of Supervisors
Delta Counties Coalition
Contra Costa Council